THE PROCEDURE IN THE *COUR D'ASSISES* OF PARIS.[1]

The *Cour d'Assises* is the court in France for the trial of felonies before a jury. From the beginning of a case to its end, a trial in a French criminal court shows a series of contrasts with our own procedure.

Instead of having only one judge presiding, there are three. The reason for this is easily understood if we consider the history of the French people; but the explanation of an event is not an excuse for its existence. The theory, of course, is that three judges are better than one; that there are more safeguards thrown around the administration of the law when there is more than one judge. But as a practical matter, not only in the French courts, but also in the American courts, whenever there is more than one judge there is less responsibility placed upon the shoulders of each, and, instead of having more safeguards thrown around the administration of justice, there are fewer. As a matter of practice, the president of the tribunal in a French court does all the work. Though the other two judges are supposed to assist him, their functions, so far as the spectator can see, amount to nothing. They seldom speak to the presiding justice during the course of the trial; only when the time comes for deliberation concerning the punishment is their opinion asked.

Again, in our Anglo-American system, the case for the prosecution is presented by the district attorney. There is also a district attorney in the French courts, but he does not present the case for the prosecution. That task is in the hands of the president, and it is accomplished in one of three ways: by an examination and cross-examination of the defendant; by an exposition of the facts to the jury; or by a combination of the two. There has already been an investigation of the case by a *juge d'instruction* —an investigating judge who gathers all the facts of the case and of the defendant's life which can in any way conduce to the illumination of the defendant's character or the commission of the crime. The results of this investigation have been embodied in a report called the *dossier* and sent to the *Cour d'Assises* after

[1]The substance of this paper was delivered before the Criminal Science Department of the Law School of the University of Paris last February.

indictment by the *chambre de mise en accusation*—which is equivalent to our grand jury. The president of the *Cour d'Assises*, since he has examined the prisoner personally and has studied the *dossier* before coming to court, occupies a unique position.

He is acquainted with all the facts of the case, and these, following a reading of the indictment by the clerk of the court, he usually narrates to the jury. After this narration, he examines and cross-examines the defendant in order to emphasize some of the facts already pointed out and in order to bring out others. This proceeding differs according to the individual and according to the case. Moreover, the exposition of the facts to the jury need not be in the form of narration but may take the form of direct and cross-examination.

One of the first things that strikes an American in this procedure is that the president is charged to present an impartial case. Although this is the theory, the practice cannot possibly chime in with it, for it is difficult for an individual to be impartial when he is presenting both sides of a case. Even with the greatest good will, he will fail. From my experience I have found that the attitude of the presiding justice is not that of one who is trying to bring out all the facts on both sides—although I have seen the desire on his part to bring out some of the facts which may tend to the exculpation of the accused—but of one who very naturally has been influenced by the *dossier* and by his impressions of the prisoner gained at the time of the prior examination in prison, and who has usually come to the conclusion that the defendant is guilty and should be made to explain. This gives the president a great deal of power, not only over the defendant, but also over the conduct of the trial and the decision of the jury. Under the law, the jury is supreme. But what does this theory amount to in practice? The president, under the law, is not allowed to charge the jury, the idea being, of course, that he must not be given an opportunity to affect the jury in his charge. But he is given every opportunity to do this very thing in the most impressive way during the course of the trial![2] Again, the judge's cross-examination takes the place of that by the prosecution; but there is no parity, since the judge does not cross-examine the witnesses on behalf of the prosecution. In truth, the damage done by the judge is minimized only by the fact that the French jury is by tradition hostile to the court.

[2] *Code d'instruction criminelle*, Art. 313, 315.

Another of the striking differences is that the defendant is immediately put upon his defence. The case has already been investigated by an inferior judge and the defendant indicted by the chamber of indictment. All this preliminary procedure seems to point to at least a certain foundation for the action, and the reasoning is that the defendant having reached the *Cour d'Assises* must explain why he is in court. He need not explain until after the presentation of the case against him,[3] but failure to speak will result in suspicion and probable conviction, since the French jury, unlike our own, may take such failure into consideration. While in a sense it may be logical to ask the defendant to explain the case that has already been made against him before the *juge d'instruction* and the chamber of indictment, in another sense it is highly illogical. This is a matter of trial reason. For, in theory and practice the jury ought to be, and indeed as a matter of theory under the French procedure is, the body that is to determine whether in this particular case and at this particular time the defendant has committed the act with which he is charged; and a jury cannot properly conceive the elements of the case and do justice if the accused is put upon his defence before the evidence against him is presented. The case before another judge ought to have nothing to do with the presentation of the case before the *Cour d'Assises.* And our Anglo-American procedure recognizes this. It recognizes that the case before the jury must be full and complete; that the jury being the judge of the facts must have every shred of evidence presented to it if it is to function properly. The gravity of the injustice worked by the French procedure is, it is true, minimized because, in many instances, the defendants admit their guilt and the trial proceeds upon the basis of the number and the quality of the attenuating circumstances which mitigate the enormity of the crime.

The attitude of the president towards the witnesses examined in the course of the trial is one of cordiality and credulity. A witness may say almost anything he pleases, whether on one side of the case or the other, and the president pays him the highest respect and does not for a moment doubt his truthfulness. All the studies in the psychology of testimony that have been made during the last forty or fifty years in Europe and America, and all the results of the practical working out of cross-examination under the Anglo-American system, are neglected when these wit-

[3]Garraud Precis de Droit Criminel, 844.

nesses are concerned. This is in striking contrast to the judge's attitude toward the defendant. He is sceptical concerning almost everything the defendant says, and the examination of the accused goes into every detail of the crime and almost every detail of the man's life and is consequently usually long, involved, minute and one-sided. During this examination the president occasionally makes remarks concerning the effect of the testimony—remarks sometimes playful, sometimes doubting, sometimes ironical, and sometimes sceptical. All this has its effect upon the jury. I remember one interesting case of the *crime passionnel.* The defendant's first name was Carmen, and the president, whenever he had occasion to refer to her, called her by her first name in a tone of voice which reminded a person of the Carmen of the opera. Indeed, at one time, the judge specifically made the comparison. This, of course, is highly prejudicial. The minds of the jury are influenced and the outcome of the trial (except in a case of the *crime passionnel,* where the jury is not often affected by anything the judge says), is almost certain to be against the defendant regardless of the evidence—unless, indeed, the conduct of the president produces a revulsion of feeling and the prisoner is acquitted by the jury as a demonstration of power.

The active part the president takes in the trial leads to another result: the dignity of the court suffers. Disastrous consequences flow from this.

After the examination of the defendant, the president calls in the witnesses. They should present a complete case for the prosecution and the defence; but they do not do so. The *dossier* is the complete case, and, although the jury is not informed concerning all the matters in the *dossier,* it is constantly told to take cognizance of it—a practical impossibility. The president has a list of the witnesses for the prosecution and for the defence. Both the witnesses and the order of their appearance on the list are determined by the *avocat general*—the district attorney—in accordance with article 317 of the *code d'instruction criminelle.* Article 321 of the code further provides that the witnesses for the prosecution shall be called first. The president, however, calls on whomever he pleases and in the order he pleases. The case presented for the prosecution is usually, if not always, not comparable in order to that presented under the Anglo-American system. Our system conduces to harmony and beauty in presentation, as well as to clearness and power. The French system, in

spite of the natural clarity of the French genius, affords features which are not in accord with the French character. The examination and cross-examination of the defendant have produced the first rift in the lute of order. The jumbled examination of the witnesses completes the destruction of the instrument. The lack of those rules governing the presentation of evidence which are strictly binding in the Anglo-American procedure, and the method of deposition which allows the witness to tell his own story, are further causes of the lack of an orderly progression of evidence. This does not mean that the facts are not brought out, but simply that the system does not allow of a clear presentation of the case to the jury. But, at least, an æsthetic case could be developed if the president employed skill and art.

Theoretically, and this works out in practice, the attorneys in the case have no right to examine or cross-examine the defendant or the witnesses. They may, at the discretion of the president, ask questions through the medium of the court; and sometimes, when the president is tired, or is well disposed toward the particular attorney, direct questions are permitted. But questioning in a French court of justice, except by the president, is a rare occurrence.

Under our American system, the cross-examination is the most important feature of a trial. It not only occupies a large part of the proceedings, but it is most vital in the ascertainment of truth. Without cross-examination an American trial would be a misnomer. It is for this reason among others that I call a French trial a misnomer. There is no actual trial of the case. There is no sifting of the truth from the untruth, no analysis of the testimony of the witnesses. There is simply presentation of the facts and of all sorts of things which are not facts; there is exposition, narration, psychologic analysis, especially in considering the facts which lead to attenuating circumstances in the case. Argumentation is rare, and the discussion of evidence is almost unknown. *A priori,* it would seem that a trial could not bring out the true facts without cross-examination; and *a posteriori,* after having witnessed many trials in French courts, I am decidedly of the opinion that cross-examination, as it is practiced in our courts, is the *most vital safeguard* of the defendant and should be cherished by society. It should be a right, and not, as under the French system, a matter in the discretion of the president. Moreover, it should be a right exerciseable directly, and not through the president. One of the

most surprising things in a French court is to see witness after witness come to the stand, give his deposition—the testimony of a witness is not brought out by question and answer, but by narration by the witness of the facts as he sees them—and retire. The president sometimes asks a question in order to obtain an explanation of some of the testimony, but this seldom happens. The district attorney hardly ever asks any questions. The attorney for the defendant, who ought to be on the alert and interested, seems utterly oblivious of the power of cross-examination.

The fact that the theory of the law and the practice are against cross-examination makes the French attorney less sharp in detecting erroneous statements and less anxious to correct the misstatements which are often made. And consequently, astounding statements are made and there is no effort on the part of anyone in the court-room to discover the sources of the witness' knowledge, or his capacity or desire to give testimony which is true. All that can be said in defence of this procedure is that an attorney may ask questions through the president; that although this is awkward and trammeling, cross-examination can nevertheless, with limitations, be resorted to; that the law of 1897 allows a contradictory procedure before the *juge d'instruction;* that this procedure permits an attorney to advise his client and be present at the time of the examination before the *juge*; that, although as a matter of law, the attorney has no right to cross-examine or even to speak without the permission of the *juge,* yet being present, he may, to a certain extent, influence the *juge* to consider certain evidence and to neglect other evidence, and may even be allowed by the *juge* to examine the witnesses—a thing which though perhaps never done, is, nevertheless, in theory, possible; and finally, that because of all the foregoing, there is a sort of approach to a presentation of the other side. This is an extenuation, but nothing else than that.

One more word must be said about cross-examination. I am informed that on occasion, though rare, there is such examination, and it is as prolonged, as direct and as searching as could be wished. Moreover, the lack of it may be partially explained on the ground that as a rule there is no dispute as to the facts of the alleged crime because the defendant has admitted his guilt and the trial is merely a proceeding to establish the attenuating circumstances which will lighten the penalty. But even so there ought to be room for dispute concerning the facts in aggravation or

extenuation of the crime, and cross-examination should be a powerful instrument in the settling of that dispute.

The *avocat general,* just as our district attorney, is, in theory, a *quasi*-judicial officer. But whereas our district attorney is, in practice, usually nothing more than a prosecuting officer and seldom retains his *quasi*-judicial character even during the investigation of the case prior to trial, the French district attorney does retain that character throughout the case. It is delightful to see him, sometimes proceeding forcefully against the defendant, and at other times, when the case demands it, working on the side of the prisoner. In a large proportion of cases his leniency is very marked, and though he does demand the conviction of the defendant in ninety cases out of a hundred, even then he generally asks the jury to apply the doctrine of attenuating circumstances. Contrary to our procedure, he does not examine the defendant or the witnesses, and, though he has the privilege of asking questions through the president, he rarely avails himself of it. His opportunity comes upon summing up, when he delivers what is called the *requisitoire.* This speech is based not so much on the facts as they have been brought out during the trial, as on the *dossier* which has come up in writing. The district attorney and the attorney for the defendant, as well as the president, have read the *dossier* before the case comes to the *Cour d'Assises,* and it is upon the basis of the knowledge thus acquired that they make their summing-up addresses. This enables them to prepare the speeches before trial, a thing which is, of course, difficult under the Anglo-American system. One would think that as a result of this, a French attorney's address would be better than that of an American lawyer. After having witnessed many cases both in France and America, I incline to the opinion that our addresses are no less sound than those delivered in a French court of justice. The French are good at exposition, narration and psychological analysis. The work that they have to do lends itself to these three qualities. The speeches usually set out the facts of the crime and the facts of the defendant's life. In order to do these two things, the art of description and exposition, and the art of psychological analysis must be cultivated. When I come to discuss the doctrine of attenuating circumstances, the reader will see why psychology is a necessary element in the trial of a French case. Americans, on the other hand, show a readiness of wit which is not called for in the summing up in a French court. They are, furthermore, powerful in

the discussion of evidence and in argument. The form of the addresses is, however, not so good as that found in the French speeches. This is attributable to four reasons: first, to the fact that the matter with which the French lawyer has to deal lends itself to beauty of form; second, to the fact that the French lawyer is able thoroughly to prepare his address because he need not depend upon the facts as they come out in court, but may depend absolutely upon the *dossier*; third, to the better education of the French lawyers; fourth, to the French instinct for beauty. We are direct, heavy, often rough and uncouth, depending rather upon facts than upon their æsthetic presentation, depending rather upon force of stroke than upon persuasion through beauty. We do well, however, considering that our summing-up speeches come immediately after the presentation of the evidence and that this evidence, in large part, is unknown to the attorneys before the trial of the case.

The French district attorney may appeal to the *Cour de Cassation*. Under our procedure he may appeal on matters of law before trial if, for instance, he is defeated in a question pertaining to the indictment; but once the case goes before a jury he is barred from any appeal, no matter how meritorious the case may be. It may be sound not to allow the findings of fact of a jury to be disturbed, but when the laws themselves have been violated there would seem to be no reason for denying the state the protection of an appeal.

The *partie civile*—the complainant, or someone wronged by the crime of the defendant—has a good function in a French trial. He is an aid to the district attorney; the court is enabled to dispose of the civil action and the criminal one at the same time, for it can, while convicting the defendant, award damages to the *partie civile*; and, since the *partie civile* may be compelled to pay the costs if he does not prove his case, there is a diminution in the number of cases brought on false charges. It is to be noted, however, that the complainant or other person entitled need not become a *partie civile* unless he so desires and, of course, if he is not a party, he is not liable to an assessment of costs. The fact that the French, with their high regard for personal liberty and their distrust of the state and its agents, allow a *partie civile* can perhaps be explained on the ground that the common practice in France of appointing exceptionally strong counsel for the accused with a consequently forcible defence of the prisoner's rights, has led to a realization that, if the forces of the opposing sides are to be even, the district attorney must be allowed to receive aid from private counsel.

The position of the attorney for the defendant is very different in France from what it is in this country. He has not the same standing in court; and in a conflict between himself and a witness, the president usually sides with the latter. In America, the opposite is the case. The attorney has great power over the witness and is always enabled to ask a direct question and demand a direct answer. Not only is the right of cross-examination denied in France, but, there, because of the theory of the deposition, the witness may wander over a great many fields or restrict himself within certain fields as he desires. I had an illustration of this in one of the cases I saw tried. The attorney, in a feeble attempt at cross-examination, which was really an attempt to blacken the character of the witness, asked questions concerning the previous history of the witness, especially the work that he had been doing in Austria and in Germany. The witness refused to answer any question which he considered irrelevant to the subject at issue, namely, whether money had been stolen by the defendant at bar. Counsel insisted upon getting answers to his questions, and the witness persisted in refusing to reply. The queries of the attorney would have been ruled admissible even in this country, as tending to attack the credibility of the witness, yet in spite of the French practice of allowing anything to go in, the court ruled, "the witness says he will not answer any questions not referring to the matter at issue, and I can do nothing". The attorney protested to the president, and presented his "conclusions"—a statement of the questions that he had asked, of the fact of the refusal of the witness to answer, and a demand that the court punish the witness for not answering. Despite the fact that the French code provides for the compelling of a witness to answer a proper question, the president—whatever the reason may have been, whether political or otherwise—refused to accept the attorney's conclusions. Compare this proceeding with that in an American court where the judge would consider the evidence, rule upon its admissibility or inadmissibility, and both parties would thereby become bound to abide by the ruling or be found guilty of contempt of court.

The strong position occupied by a witness in a French court is the result of over a century of revolution which has made individual liberty highly prized. The Comte de Franqueville, in his interesting and valuable discussion of the English system of criminal trials, makes a palpable hit when he criticizes the harshness of the cross-examination. Under that system, which is our own, the

blackening of character, the terrorizing of witnesses and the frightening of them away from court to escape the merciless inquiry into character, is a scandal. The French theory is that the witness shall be free in, as well as out of court. The French have suffered too much from arbitrary judges.

The questioning by the attorney, when there is any questioning at all, is limited usually to one or two inquiries. It sometimes happens that the attorney repeats the answer of the witness to the jury—a thing which is not at all unknown in an American court. Again, he interprets the testimony that has been given by a witness, interprets it immediately after the testimony has been given, and even argues matters presented in the testimony while the witness is still on the stand. In addition to all this, argumentative questions are frequent. Such interrogations would not be rare in the American courts if the judges allowed them; they are extremely tempting.

The ease with which attorneys for the defendant swallow a great deal of the evidence presented, is a remarkable feature of a French trial. It is not within the province of this article to attempt to consider all the causes of this, but it may be interesting to note that there are three main reasons for the gullibility. The first is the fact that there is little or no cross-examination; the second, which is in part the cause of the first, is that, in view of French character and French history, if an attorney berated a witness or put him through a hard cross-examination, the jury might readily turn against the attorney; and the third lies in the fact that the sort of judicial determination of questions which has been made by the *juge d'instruction* receives a great deal of respect in the higher court. It is this last mentioned reason which in large part accounts for the scant discussion of evidence and the lack of conflicting testimony in the *Cour d'Assises.* If the attorney for the defendant attempted to discredit or disprove the evidence in the *dossier,* he would be met with coldness. Truly, the *dossier* is the primary evidence and the testimony brought out in the *Cour d'Assises* is only secondary. The effect of this practice upon the jury has already been indicated.

Even expert witnesses are not examined by the attorneys for the defendant, and the gullibility of the lawyer, the unquestioned acceptance of the testimony adduced, the awe of the findings of the *juge d'instruction,* all lead to curious and sometimes disastrous results. An expert witness in the French court is always a state witness, for France does not recognize private expert witnesses.

He makes a thorough investigation and then writes out his report. If he is not present at the trial, this report is read; if he is present, he makes his deposition and explains what he has found to the jury. Wild statements go unchallenged, the prisoner's attorney simply smiling and asking no questions.

In fact, the only part taken by the prisoner's counsel during the proceedings is in the exercise of his right to discuss the testimony of a witness immediately following the giving of that testimony, and in his summing up and rebuttal. The summing up address has been previously referred to and is based chiefly upon the facts in the *dossier*. Prisoner's counsel's address is a combination of discussion of the facts of the crime, of narration of the defendant's life, of expression of personal opinion concerning the innocence of the defendant, of the presentation of the attorney's personal testimony in favor of the defendant, and of the bringing forward of other testimony not included in the *dossier*. Once in a while you hear an interpretation by the prisoner's counsel of the facts presented, different from the interpretation given by the district attorney. The disorder of the whole proceeding is marked. In this country counsel may not express his personal opinions or introduce evidence which has not been given under oath and subjected to cross-examination. The attorney for the defendant in a French court has a right to say what the defendant has told him, what letters the defendant has written him, and, in fact, anything he pleases. I have seen this happen often and have never heard any objection made by either the district attorney or the president.

Following the summing-up speeches, the attorneys for both sides have an opportunity for rebuttal, the district attorney preceding the defendant's counsel. This is more just than our system not only because it gives the prisoner's attorney an opportunity to rebut the arguments of the prosecuting officer, but also because it allows the defence to have the last word.

The striking feature adverted to above, that in a large percentage of the cases which come before the *Cour d'Assises* the defendant pleads guilty, is perhaps to be accounted for by the procedure in the preliminary stages before the *commissaire de police* and the *juge d'instruction,* and by the French theory that the defendant has no right to conceal anything, but must answer all questions put to him by the *commissaire* and the *juge*. It may be that this procedure conduces to the telling of the truth. At all events, since the prisoner usually admits his guilt, there is very

little time spent by prisoner's counsel in talking about the facts concerning the commission of the alleged crime, almost all effort being devoted to explaining the reason for its commission. And it is this explaining of motives which is the outstanding feature of a French criminal trial.

The whole doctrine of attenuating circumstances now comes to the fore. This doctrine was brought into French law in order to mitigate the rigors of the Napoleonic Code, and to take away from the judges their power of sentencing in their own discretion. The law being so rigid, and the punishment so severe, juries constantly broke the law and acquitted the defendant even though the facts charged in the indictment had been proved. In 1824, Parliament took notice of this condition of affairs, and although the code itself was not changed, the judges were given the right to mitigate the punishment upon the determination *by them* of attenuating circumstances. The juries, however, distrusted the judges and continued to acquit in spite of the evidence. And so, in 1832 another law was passed, which gave *to the jury* the right to determine the existence or non-existence of extenuating circumstances. At the present time, the jury decides whether the facts charged in the indictment have been proved, and also whether there are any attentuating circumstances in the case; but the law lays down for each particular case the punishment that is to be meted out to an individual who is found guilty with attenuating circumstances. The jury, then, is informed of what will happen to any one if he is so convicted, and the law has taken the place of what was considered by the jury to be the arbitrary judgment of the judge.

This doctrine is, of course, sometimes used for improper purposes. In cases of the *crime passionnel,* the Parisian jury, acting differently from the provincial juries, has for the last forty years acquitted on the theory that the attenuating circumstances in the case so refine the act charged in the indictment as to annihilate it. Of course, this is a violation of the law, just as there is similar violation when our own juries acquit under the same circumstances. The jury in such cases, having found the facts to be true, should convict, and, if they consider that there are attenuating circumstances in the case, they should so determine. The judge would then mete out the punishment indicated by the code. Generally, however, the doctrine is not so misused even though called into play by the attorney for the defendant in every case, and applied by the jury in almost every case.

What does the doctrine amount to? Simply this: that the individual has committed a crime under such conditions as to mitigate the enormity of the offense. Conditions which would accomplish this are many and varied. They may apply to the actual commission of the act, or to facts occurring at any time before or after its commission. The whole life of the defendant is, therefore, laid before the jury in order that it may see all the circumstances and motives which have conduced to the perpetration of the crime. It is easy to see that this proceeding which not only considers the individual at a particular time, but also considers his evolution and heredity, is really a psychologic and sociologic study, rather than a juridical one. And it is easy to see, also, that it is not difficult to find attenuating circumstances in almost every case; and all the more is this so when the question is left to a jury.

The tendency of the jury to apply the doctrine when the mitigating circumstances are few and light, but to refuse to apply it, that is, apply it not wisely but too well, and to acquit if the attenuating circumstances are vital, leads to catastrophic conclusions. The jury reasons that the more corrupt the defendant's heredity, the more untoward his circumstances of life, the more fetid and deteriorating his environment, the more is the enormity of his offense reduced and the greater is the call for an acquittal. From the social viewpoint the reverse is the truth. The greater the number of attenuating circumstances in a case, the more is the individual unfit to resume his place in society, and the greater is the necessity for sending him to a proper institution for care. And even in the other cases, where the jury has considered the circumstances to be somewhat extenuating and the judge has sentenced the defendant to a shorter term in prison, the prisoner is not usually fit, at the end of this shorter time, to resume his place in society. He ought rather to be sent to an institution for further care. In actual practice, therefore, the doctrine of attenuating circumstances is apt to work out to the disadvantage of society, and, in fact, against the real welfare of the prisoner himself.

If the French system cannot stand without the application of the doctrine, then at least the jury should be limited to the determination of the existence of attenuating circumstances, and the individual, if convicted, should be sent to an institution, there to be cared for until he is fit to return to society. Again, a distinction ought to be drawn between attenuating circumstances;

for, some ought to lead to early liberation of the convict, and others to later liberation. At present, no such distinction is made. The code treats every case alike, and looks not to the individual but to the crime he has committed. The punishment, therefore, is meted out merely according to the quality and gravity of the crime, and is not measured by the crime and the particular set of attenuating circumstances taken together. When one considers the difficulty of determining the existence of attenuating circumstances, particularly in cases of the *crime passionnel* where the facts are so intangible, so subtle and so complicated, and where the questions involved are psychologic, social, biologic and philosophic, it seems foolhardy to leave even that problem to the ordinary jury. The function of the jury in the scientific system should be merely the determination of whether the facts set forth in the indictment have been proved. The problem of the existence of extenuating circumstances should be left to a board of scientists, and it should be for them to determine what treatment is most desirable in the particular case. For such a board the governing principle would undoubtedly be that the greater the attenuating circumstances (in the sense in which I have been using these words) the longer the treatment necessary to fit the defendant for his return to society.

The French jury does not get a complete case such as we know it in America. Our theory and our practice is that everything admissible must be presented to the jury in order that it may determine the rights of the case. But in France such is not the practice, for the *dossier,* which contains all the evidence, is not read in court, and the jury must rely wholly on the evidence introduced in the course of the trial. Such evidence, however, is not that which is in the *dossier,* for some of the witnesses come and some stay away, and some are called and others are not. Moreover when a witness does stay away his deposition before the *juge d'instruction* is read to the jury without any of the precautions we take before admitting such testimony. There is no scrutiny of the testimony, because there is no cross-examination. The only evidence offered the jury of its validity is the fact that it has been presented to the *juge d'instruction* and that the *juge* has probably considered the matter from all sides. But as a matter of fact the *juge* has not considered both sides. He has not cross-examined. He presents a one-sided report and this report is read in open court.

Besides the lack of the safeguard of cross-examination, there is a lack of vividness in the presentation of written as contrasted with spoken testimony. The jury has a right not only to see the witness, not only to study his character while he is being examined and cross-examined, but also to be vividly impressed by the most forceful and concrete method of impression, namely, by testimony coming from the lips of the witness himself. The fact that the evidence is not presented in an orderly fashion; that there is no presentation of the case by the district attorney, followed by the case for the prisoner; that there is little examination and cross-examination or rebuttal followed by surrebuttal; that such examination and cross-examination as there is, may be jumbled, and that rebuttal may take place when a witness is giving his direct testimony, through the confronting of that witness with another witness; the fact that vital elements of the case sometimes do not come out because witnesses are absent and their depositions which are read do not create the impression on the jury which oral testimony and cross-examination would create—all these matters conduce to confusion in the minds of the jury concerning the elemental facts of the case.

To make matters worse, the jury, under the French system, is judge of the law as well as of the facts.[4] This is surely unscientific procedure. In fact, if better judges could be secured, it would be advisable to abolish the entire jury system, except in cases of political offenses, of labor offenses and in the determination of questions of insanity. Jurors in France, due to the rules for jury service, are of a higher average intelligence than jurors in America, but the result even in France is not to the credit of the jury system. The fact that the case is not presented in as clear a fashion under the French procedure as under the Anglo-American system may account in part for this failure, but it is the jury system itself which is fundamentally at fault. Ordinary men who come from their businesses to consider such questions of fact as are presented to them in the courts of justice in the fashion in which these facts are presented, are not competent. And however bad it is to have a jury decide questions of fact, it is a great deal worse to have it decide questions of law. They are not technical men and cannot, under the circumstances, accurately pass on questions of law such as are presented to them for decision by the courts in France. Yet the *Cour de Cassation*, the Supreme

[4] *Code d'instruction criminelle*, Art. 337.

Court of France, has ruled over and over again that it will not interfere with the decisions of the jury and, except in a very few cases, that the jury has the right to answer the questions put to it by the president of the tribunal—and these questions involve not merely a determination of whether the defendant has committed the acts charged in the indictment, but also whether he has committed the *crime* therein charged.

A great deal of confusion in the minds of the jury is caused also by the French system of allowing every kind of evidence to be admitted. In this country we carefully guard the jury against the abuse of irrelevant testimony, and, though we do not succeed famously, at least we try hard. Our defect is in allowing in too little; the French fail in allowing in too much. When a witness comes to the stand in a French court, he is not directed by examination as to what he is to say, but is merely asked by the president to tell what he knows about the case. All the consequences of this are evident and natural. Under the theory of the law he is to express his opinion unaided and untrammeled, and he proceeds to do it in a most beautiful fashion! Testimony which is given of his own knowledge, of the knowledge of others, or even on the mere suspicion of others—all this is presented by the witness, and you cannot distinguish between the different sorts of testimony which he is offering. It is only in rare instances that the president of the tribunal attempts to determine what has been said upon the witness' own knowledge as distinguished from what has been said upon the basis of information imparted to the witness by other people. There is, therefore, no sifting of the valid from the invalid, of the weighty from the light, and even if such were the case, it would be very difficult for the jury to retain the distinction in mind. Just as there is no examination concerning the sources of the testimony, so there is none concerning the capacity of the witness to give the testimony. Under such circumstances the jury does not know and cannot possibly ascertain the weight which should be given to any particular piece of evidence.

From the foregoing, it is easy to see that criminal trials in France abound with hearsay and opinion evidence. These are two of the most prejudicial kinds of testimony that can be produced before a jury. Though they may do little if any harm when the body judging of the evidence is intelligent and independent, yet when the average jury is to determine the question involved, the damage may be incalculable. This is, of course, particularly true

where opinion and hearsay evidence are not only admitted but are allowed to go in without the jury's being informed as to the doubtful character of such evidence.

Take for instance the question of opinion evidence where a witness comes to give testimony concerning a murder. He tells the facts of the murder, and then is asked by the president whether the person murdered seemed to have been asleep at the time of the commission of the act. Whether or not a person is killed in his sleep is an extremely technical question, and yet here is an ordinary layman expected to express a sane and accurate opinion concerning that medical matter. We, on the other hand, go too far in restricting testimony in cases of opinion evidence, just as in cases of hearsay evidence. We also go to ridiculous extremes in promulgating rules to prevent such testimony, and then proceed by a liberal use of sophistry to allow by indirection what we deny directly.

Before leaving this branch of our subject, it is important to note that the French jury decides upon the guilt or innocence of a defendant and determines the existence of attenuating circumstances by a majority vote.[5] This is better than our system since it avoids the many miscarriages of justice attributable in our courts to the necessity of unanimous concurrence. Throw safeguards around free expression and free defence, and then let a majority of the jury determine guilt or innocence: one muddleheaded or obstinate person can hold up the other eleven.

There is no stenographer in the French court. Indeed, article 372 of the *code d'instruction criminelle* expressly says: *"Il ne sera fait mention au procès-verbal, ni des réponses des accusés, ni du contenu aux depositions, sans prejudice toutefois de l'execution de l'article 318 concernant les changements, variations et contradictions dans les declarations des témoins"* (which latter changes, variations and contradictions refer to the testimony of a witness and are noted by the clerk in long hand upon the direction of the president). Questions of fact are finally decided by the jury;[6] appeals go up to the *Cour de Cassation* on matters of law,[7] usually matters of form. Our higher courts, on the other hand, are the

[5] *Code d'instruction criminelle,* Art. 347.

[6] *Code d'instruction criminelle,* Art. 350. This statement is true in practice. In theory, however, the court may set aside the verdict of the jury when it has declared the defendant guilty, provided that the court is convinced that the jurors have been wholly deceived (*se sont trompés au fond*). *Code d'instruction criminelle,* Art. 352.

[7] *Code d'instruction criminelle,* Art. 373.

final arbiters even of questions of fact. When the whole record goes up before them, they may see whether justice has been done. If we in America changed our procedure to the extent of doing away with reversals because of technical objections and established as a fundamental principle that no case could be reversed save where injustice had been done, the whole record would be an invaluable aid to the administration of law. At the present time, however, our courts tend to go through the record with a fine comb for technical objections which have nothing at all to do with the fundamental merits of the case, and consequently, the record is often an instrument for the accomplishment of injustice rather than of justice.

Before I went to France, I was entirely disgusted with our American procedure. The attitude of the courts and especially of the attorneys had made me completely antagonistic to our system of evidence as it was in operation. After having seen the practical working out of another system, so distinct from ours, I have come to recognize the value of rules of evidence and the advisability, indeed the necessity, the beauty and the harmony of the Anglo-American system of evidence. We must, however, attempt to get rid of the rubbish around the law, for at present the rules of evidence are subject to so illiberal and rigid an enforcement, and proof of certain facts is so restricted, that no intelligent idea of a case as a whole can be obtained. It would seem wise, therefore, to appoint a committee of say three experts whose task it should be to revise the law of evidence, retaining the broad, fundamental principles which lead to the ascertainment of the truth and dispensing with the baggage which has accumulated in the course of years.

We might do well also in allowing our judge some of the power granted the president of a French tribunal in the conduct of a trial. Our judge has lost the dignity and the power of the English judge, and we must restore to him what we have taken away. He is a man with a technical training and, in addition, has had at least as much experience in life as the average juryman. He is certainly fitted, therefore, to weigh and sift the evidence presented before the court, and, consequently, should be given not only the right to expound this evidence, but also to comment upon its weight.

The judge can certainly hold the questioning within the issue. He should allow no excursions and no unnecessary prying into the private lives of the witnesses; the cross-examination should thus be limited, and the character of the witnesses protected. What is

now a reproach to our law should be removed. On the other hand, witnesses ought to be allowed to speak more freely, and, in this respect, we should do well to take a leaf out of the book of the continental system. The stupid and maddening restriction of the answer of a witness to a "yes" or a "no" should be sent into limbo, and the witness should be allowed by the judge to give explanations unhindered to the extent to which he is hampered at present by the cross-examiner. The judge's discretion should be the guide and the final arbiter, and he should not be reversed except where he has been guilty of a flagrant abuse of this discretion. Before, however, such a scheme can be properly carried out, the attitude of the superior courts must change materially, so that the trial judge need not labor under constant fear lest a mistaken ruling on a minor point will lead to a reversal of judgment and a retrial.

Under our Constitution, the defendant cannot be compelled to testify against himself and, therefore, he cannot be made to take the stand. It would, however, be perfectly constitutional to provide that failure to testify might be the basis of an inference of guilt. Such is the rule in New Jersey today and also in Great Britain and Australia. There the judges may charge the jury that inferences may be drawn against a defendant who stands mute during the trial. Such a system would be conducive to the ascertainment of the truth.

The administration of justice would be further aided by a combination of the French and the American district attorneys. That is, it would seem advisable for our district attorneys to be, in practice, as well as in theory, *quasi*-judicial officers during the investigations prior to trial, but to be merely prosecuting officers during the trial itself. This would insure a fair and adequate investigation, a thing which is impossible under our present system; and would, at the same time, provide, through the presentation of strong evidence on one side and strong evidence on the other, for that conflict and clash which is essential to the bringing out of the truth.

Although our system of recommendation of mercy by the jury to the judge is, I believe, more logical and practical than the French theory of attenuating circumstances, yet even our procedure is defective in that the judge is allowed to determine what shall become of the individual convicted. The average judge is not a competent person for such a task. A board of parole having cognizance of all the facts is the proper body. Of course a judge has,

because of our probation system, the opportunity of finding out the past history of the defendant and of basing his sentence thereon. But this could be accomplished even more satisfactorily by the board of parole, specializing and devoting all of its time to the particular task.

We Americans must, if we wish to have a workable system of criminal law, secure better jurymen. This may be accomplished in two ways; first, by raising the standards of eligibility for jury service; and second, by allowing exemption from this service only to those who are indispensable to the work of the body politic outside of the jury room.

The lax administration of our criminal law which often approaches the scandalous must end, and the delays and mischances due to the medieval technicalities which burden our system must be abolished. We must prosecute and we must convict. And finally, the elevation of our Bar and the elimination of trial by newspaper through a liberal use by the courts of their power to punish for contempt are prerequisites to the effective working out of any system whatsoever.

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